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SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940

An Analysis

by

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On October 18, 1941, Mr. Cassius A. Scranton, Vice-President of the Chicago Title and Trust Company, delivered a talk on the Soldiers' and Sailors' Civil Relief Act of 1940, before the members of the Illinois Circuit Judges Association and guests at Mt. Vernon, Illinois.

Numerous requests have been made for copies of the paper from which he made his remarks and it has been suggested that it be made available in its entirety to members of the Illinois Bench and Bar. It is our hope that this presentation of the subject will be of interest and value to you.

CHICAGO TITLE AND TRUST COMPANY

SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940.

The Soldiers' and Sailors' Civil Relief Act, approved October 17, 1940, was adopted to take the place of those parts of the Selective Training and Service Act approved September 16, 1940 and the National Guard Act approved August 27, 1940, which re-enacted certain provisions of the Soldiers' and Sailors' Civil Relief Act of 1918. The Soldiers' and Sailors' Civil Relief Act, approved October 17, 1940, supersedes such re-enacted provisions of the 1918 Act and adds other provisions. Many of the sections of the 1918 Act and the 1940 Act are identical, even to the extent of having the same section numbers. The changes in the 1940 Act, where they occur, are, for the most part, those that are related to the differences in the natures of the emergencies which gave rise to the adoption—the 1918 Act being a World War measure, and the 1940 Act a Peacetime National Defense measure. In general, there are no such differences between the two acts as to affect the value of judicial decisions under the former Act, on similar questions arising under the 1940 Act.

The purpose of both acts is to suspend the enforcement of certain civil liabilities of persons in military service.

Within the scope of this paper, it will be impossible to discuss all of the provisions of the Act or even to mention some of them, but I will devote my time to the provisions which most commonly reach the court's attention.

CONSTITUTIONALITY

There cannot be much doubt as to the constitutionality of the 1940 Act. If Congress had the power to pass the Selective Service Act and to appropriate billions of dollars for defense, it certainly has the power and authority to pass laws to protect the rights of persons serving in the military, or branches of government incidental thereto. For cases holding that state statutes similar to the Soldiers' and Sailors' Civil Relief Act of 1918 are in conflict with the Federal Act and therefore void, see *Konkel v. State*, (1919), 168 Wis. 335, 170 N.W. 715 and *Pierrard v. Hoch* (1920), 97 Oregon 184, 191 Pac. 328.

The Act deals comprehensively with a single subject and leaves little room for conjecture. It was drawn with such care and particularity as to preclude much expansion of the Act by the courts in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions.

In *Ebert v. Poston*, (1925), 266 U. S. 548, the late Justice Brandeis, speaking of the 1918 Act, said, on page 554,

"This Act is so carefully drawn as to leave little room for conjecture. It deals with a single subject and does so comprehensively, systematically, and in detail. There are in the Act an aggregate of 36 sections and 27 sub-sections. To ensure certainty, separate provision is made for each of the several classes of transactions to be dealt with and for the situations likely to arise in each. To promote clarity, the Act is divided into six articles, each dealing with a different branch of the subject. The difference in treatment accorded to transactions taking place during a period of military service after the passage of the Act as distinguished from those occurring before, is not limited to mortgages and other secured obligations dealt with in Section 302. A like distinction is made in the Act in respect to other classes of transactions. Such care and particularity in treatment preclude expansion of the Act in order to include transactions supposed to be within its spirit, but which do not fall within any of its provisions."

PURPOSE

The entitlement of the 1940 Act is:

"AN ACT TO PROMOTE AND STRENGTHEN THE NATIONAL DEFENSE BY SUSPENDING ENFORCEMENT OF CERTAIN CIVIL LIABILITIES OF CERTAIN PERSONS SERVING IN THE MILITARY AND NAVAL ESTABLISHMENTS, INCLUDING THE COAST GUARD."

Section 100 which states the purpose of the Act, is as follows:

"In order to provide for, strengthen, and expedite the national defense under the emergent conditions which are threatening the peace and security of the United States and to enable the United States the more successfully to fulfill the requirements of the national defense, provision is hereby made to suspend enforcement of civil liabilities, in certain cases, of persons in the military service of the United States in order to enable such persons to devote their entire energy to the defense needs of the Nation, and to this end the following provisions are made for the temporary suspension of legal proceedings and transactions which may prejudice the civil rights of persons in such service during the period herein specified over which this Act remains in force."

DEFINITIONS

Section 101 of the Act defines "persons in military service", "military service", "active service", or "active duty", "period of military service", "person" and "court".

Section 101 reads as follows:

"(1) The term "persons in military service" and the term "persons in the military service of the United States", as used in this Act, shall include the following persons and no others: All members of the Army of the United States, the United States Navy, the Marine Corps, the Coast Guard, and all officers of the Public Health Service detailed by proper authority for duty either with the Army or the Navy. The term "military service", as used in this Act, shall signify Federal service on active duty with any branch of service heretofore referred to or mentioned as well as training or education under the supervision of the United States preliminary to induction into the military service. The terms "active service" or "active duty" shall include the period during which a person in military service is absent from duty on account of sickness, wounds, leave, or other lawful cause.

(2) The term "period of military service", as used in this Act, shall include the time between the following dates: For persons in active service at the date of the approval of this Act it shall begin with the date of approval of this Act; for persons entering active service after the date of this Act, with the date of entering active service. It shall terminate with the date of discharge from active service or death while in active service, but in no case later than the date when this Act ceases to be in force.

(3) The term "person", when used in this Act with reference to the holder of any right alleged to exist against a person in military service or against a person secondarily liable under such right, shall include individuals, partnerships, corporations, and any other forms of business association.

(4) The term "court", as used in this Act, shall include any court of competent jurisdiction of the United States or of any State, whether or not a court of record."

APPLICABILITY

Section 102 provides that the Act shall apply to the United States, the several States, and the additional territory stated therein, and to proceedings commenced in any court therein.

The Section reads as follows:

"(1) The provisions of this Act shall apply to the United States, the several States and Territories, the District of Columbia, and all territory subject to the jurisdiction of the United States, including the Philippine Islands while under the sovereignty of the United States, and to proceedings commenced in any court therein, and shall be enforced through

the usual forms of procedure obtaining in such courts or under such regulations as may be by them prescribed.

(2) When under this Act any application is required to be made to a court in which no proceedings has already been commenced with respect to the matter, such application may be made to any court."

APPLICATION TO SURETIES, GUARANTORS, ENDORSERS, ETC.

Section 103 provides that the Act shall be for the benefit of sureties, guarantors, endorsers, and others subject to obligations or liabilities, the performance or enforcement of which is stayed, postponed or suspended, which section reads as follows:

"(1) Whenever pursuant to any of the provisions of this Act the enforcement of any obligation or liability, the prosecution of any suit or proceeding, the entry or enforcement of any order, writ, judgment, or decree, or the performance of any other act, may be stayed, postponed, or suspended, such stay, postponement, or suspension may, in the discretion of the court, likewise be granted to sureties, guarantors, endorsers, and others subject to the obligation or liability, the performance or enforcement of which is stayed, postponed, or suspended.

(2) When a judgment or decree is vacated or set aside in whole or in part, as provided in this Act, the same may, in the discretion of the court, likewise be set aside and vacated as to any surety, guarantor, endorser, or other person liable upon the contract or liability for the enforcement of which the judgment or decree was entered."

GENERAL RELIEF

AFFIDAVIT PREREQUISITE TO DEFAULT JUDGMENT; APPOINTMENT OF ATTORNEY; REOPENING OF JUDGMENT

The next section is 200 and this is where Judges really become interested. Section 200 relates to the necessity of filing affidavits before default judgment is taken, appointment of attorney, giving of bond, reopening a judgment, penalty and fine for false affidavit, power of any attorney so appointed, and other matters. This section is so complete and precise in its language as to leave little room for conjecture. For the sake of brevity it is not quoted, but it should be read carefully in conjunction with the following discussion relative thereto.

The questions arising under this section may be divided into several headings and I will treat them in the order in which they may arise thereunder.

IF THERE SHALL BE A DEFAULT OF ANY APPEARANCE BY THE DEFENDANT, THE PLAINTIFF, BEFORE ENTERING JUDGMENT SHALL FILE IN THE COURT AN AFFIDAVIT SETTING FORTH FACTS SHOWING THAT THE DEFENDANT IS NOT IN MILITARY SERVICE.

The question Judges are interested in under the first provision of Paragraph (1), Section 200, is whether a judgment should be entered against a person in default without an affidavit as to military service having been filed, or what to do if judgment has already been entered without such affidavit being filed and a motion is made by the defendant who is in default, to set aside the judgment because of a failure to comply with this provision of the Act. The defendant may contend that the judgment should be vacated because the court lacked jurisdiction to enter the judgment and that the judgment is void, or that because an affidavit was not filed he is entitled as a matter of right to have the judgment opened up or vacated, or that he has a meritorious or legal defense to the entry of such judgment.

In all of my searching for cases relating to the 1918 Act and the 1940 Act I have been able to find only one case in Illinois which went to the Appellate Court and none to the Supreme Court of this State.

The Appellate Court case arose under the 1918 Act and is a decision by Mr. Justice Barnes, 222 Illinois Appellate 252, (1921), *Schroeder v. Levy*, and was an appeal from a judgment for \$150.00 entered for want of appearance of defendants. It was urged as ground for reversal that the judgment could not be entered without an affidavit that defendants were not in the military service, or, in the absence of such an affidavit, an order of court directing the entry of judgment, as required by paragraph (1), Section 200. It was further contended that these requirements are jurisdictional. The court said, on page 254, that "if the provision were jurisdictional the judgment would be absolutely void. But such is not the case as the judgment, as appears by paragraph 4 of the same section, may, nevertheless, be permitted to stand. That paragraph provides for the opening of such judgment on application if it appears that it was entered against a person in the military service during such service or within 30 days thereafter and he was prejudiced by reason of such service in making his defense thereto, providing the application is made not later than 90 days after the termination of such service and it is made to appear that he has a meritorious or legal defense. The act further provides that vacating or setting aside such a judgment will not impair any right or title acquired by any bona fide pur-

chaser for value under such judgment. These provisions make it clear that as the judgment may stand notwithstanding the failure to comply with the requirements in paragraph 1, they are not jurisdictional."

Our Appellate Court has said that the failure to file an affidavit, or to have an order of court directing the entry of a judgment without an affidavit, is not jurisdictional. This Court is not the only court which has held similarly, and as a matter of fact I have been unable to find any case in the United States which has held that the filing of the affidavit relative to military service or securing an order directing the entry of the judgment without such affidavit, is jurisdictional or that the failure to file an affidavit or secure an order makes the judgment void.

Other cases holding that judgments rendered against one in or one not in service, are not void, are as follows:

(a) In *Eureka Homestead Society v. Clark*, (1919), 145 La. 917, 83 Southern 190, the court held that judgment rendered against one not in military service without first filing an affidavit is not absolutely void.

(b) Failure to file an affidavit (in a divorce proceeding) that defendant was not in military service did not affect jurisdiction of the court or make the judgment against defendant not in military service when rendered void. *State ex rel. Smith v. District Court*, (1919), 55 Mont. 602, 179 Pac. 831.

(c) Failure to file affidavit as to military service for defendants who in fact were not in military service is not jurisdictional. None of the provisions of the Act can in any way inure to the benefit of persons not in such service, and therefore, unless one or the other of the defendants can show that he was in such service at the time judgment was rendered, the failure to file the affidavit that such was not the case becomes wholly immaterial, so far as any right on their part is concerned, to disturb or cause this judgment to be set aside. *Howie Mining Co. v. McGary*, (1919), 256 Fed. 38, (Dist. Ct., Northern Dist., W. Va.).

(d) Under the provisions of the Soldiers' and Sailors' Civil Relief Act, a default judgment cannot be opened for failure to file the affidavit (regarding military service), unless it appears from the motion to vacate judgment, or from the record in the case, that the person against whom the judgment was rendered was as a matter of fact in

the military service. *Harrell v. Shealey*, (1919), 24 Ga. App. 389, 100 S.E. 800.

(e) The case of *Alzugaray v. Onzurez, et al*, 25 N. M. 662, 187 Pac. 549, (Supreme Court of N. M., January 31, 1920), was a suit to quiet title. Judgment was entered by default on November 7, 1918. On February 5, 1919 motion was filed to set aside the judgment on the ground that plaintiff before entering judgment had failed to file affidavit showing that defendant was not in military service as required by Soldiers' and Sailors' Civil Relief Act, and on such motion judgment was set aside, and plaintiff appealed. The lower court was reversed and the Court says, (see page 550 of 187 Pac.): "It has been held that failure to file such affidavit was not jurisdictional (*State ex rel. Smith v. District Court*, (Mont.), 179 Pac. 831) and also that failure to file such affidavit, when in fact the defendant was not in the military service of the United States, did not permit said defendant to take advantage of this failure and have a judgment of default against him set aside upon that ground." The Court further said, quoting from *Howie Mining Co. v. McGary*, 256 Fed. 38, "In view of all these provisions, I conclude that this statute does not affect in any way the right of the courts to assume jurisdiction over individual citizens not engaged in the service specified by the statute; that, in case they have or do assume such jurisdiction over one in such service, it is their duty, in case attention is called to the fact by either the defendant in service or some one for him, to see to it that such defendant is properly represented by attorney, and the action is stayed unless his interests will not be materially affected or he is by bond indemnified; that in case judgment is taken against him he has full remedy under this fourth clause to have such judgment vacated; that none of these provisions can in any way inure to the benefit of persons not in such service, and therefore, unless one or the other of these defendants can show that he was in such service at the time this judgment was rendered, the failure of that plaintiff to file affidavit that such was not the case becomes wholly immaterial, so far as any right on their part is concerned, to disturb or cause this judgment to be set aside.*****"

(f) In the case of *Mader v. Christie*, 52 Cal. App. 138, 198 Pac. 45, (March 30, 1921), the affidavit regarding military service was filed several months after default was entered but prior to the entry of judgment. Held that the affidavit, having been filed before entry of judgment, was seasonably filed according to the Act itself, and that since it nowhere appears that defendant was in the military service,

he was not prejudiced or at all affected by the fact that the affidavit was not filed prior to entering default. This is also the holding in *Woytek v. King*, (1920), 218 S.W. 1081, (Texas Civil Appeals).

(g) The case of *Combs v. Combs*, 180 N. C. 381, 104 S.E. 656, (Supreme Court of N. C., November 17, 1920), is an appeal from the decision of the court denying a motion to set aside a decree of divorce rendered against defendant while in military service. The motion was filed by the defendant about 21 months after the entry of the decree and was on the ground that the decree was entered in violation of the Soldiers' and Sailors' Civil Relief Act. Service was by publication and no affidavit regarding military service was filed. At the time of the entry of the decree the defendant was in the Army and was discharged from the Army January 14, 1919, more than 13 months prior to filing the motion to vacate. Held that the motion to vacate was properly denied, 1st, because defendant failed to file motion within 90 days after termination of his service in the Army, and 2nd, the defendant failed to show that he had a meritorious or legal defense to the action. In his motion the defendant failed "to set out that he has any defense to the cause of action as stated in the complaint. While he declares that he has a good and meritorious defense to said action, he fails to set out what that defense is. The statute says that it must be made to appear that the defendant has a meritorious or legal defense. It is not left to the defendant to say that his defense is meritorious or legal, but it must be made to appear so to the judge of the court; for that reason the defendant is required to set out the facts constituting his defense."

(h) The case of *Wells v. McArthur*, 77 Okla. 279, 188 Pac. 322, (Supreme Court of Okla., March 9, 1920), holds that an affidavit that the defendants were not in the military service, under the Soldiers' and Sailors' Civil Relief Act, was not required where answer was filed by the defendants, and no showing is made that the defendants were in the military service; and that judgment rendered against defendants will not be set aside on account of failure to file such affidavit, in the absence of a showing that they were in the military service at the time suit was filed or judgment entered.

It was particularly interesting to me in reading the cases to find that most of the parties complaining about judgments because of a failure to comply with this Act and the 1918 Act, were not in the military service. In other words, the contestants had the idea that failure of plaintiff to comply with the Act gave them the right to

open up and invalidate the judgments rendered against them, although they were not and had never been in the military service. You will note that the Act does not give a defendant the right to ask to have a proceeding stayed or decree vacated because some other defendant is or was in the military service.

The next provision under paragraph (1) of Section 200 is as follows:

"If unable to file such affidavit plaintiff shall in lieu thereof file an affidavit setting forth either that the defendant is in the military service or that plaintiff is not able to determine whether or not defendant is in such service."

Under this provision and the previous provision heretofore discussed, the plaintiff is required as to persons in default of appearance to file in court an affidavit setting forth facts showing that the defendant is not in the military service. If the plaintiff is unable to state that the defendant is not in the military service, then, under this section, he is required to file an affidavit setting forth either that the defendant is in the military service or that he is unable to determine whether or not defendant is in such service. The effect of the failure to file this alternative affidavit is covered by the cases which I have mentioned.

The next provision under paragraph (1) of Section 200 is as follows:

If an affidavit is not filed showing that the defendant is not in the military service, no judgment shall be entered without first securing an order of court showing such entry.

If the plaintiff is unable to file an affidavit stating that the defendant is not in the military service and no affidavit has been filed showing that plaintiff is unable to determine whether or not defendant is in service, the question for the court to decide is whether or not judgment should be entered for the plaintiff without first securing an order of court directing such entry. It seems to be useless to ask the court first to enter an order directing the entry of its judgment and it seems to me that if the court proceeds to entry of its judgment without first entering the prior order, that this judgment is just as valid as if such order had been entered. In all the cases I examined, which includes practically all the reported cases in the United States, I found no case where this question was considered. However, I did find cases which held that an affidavit in regard to military service filed before the entry of the judgment, was filed in apt time, although not filed prior to the default order.

In the case of *Mader v. Christie*, 52 Cal. App. 138, 198 Pac. 45, (March 30, 1921), the affidavit as to military service was filed several months after default was entered but prior to the entry of judgment. Held that the affidavit, having been filed before entry of judgment, was seasonably filed according to the Act itself, and that, since it nowhere appears that defendant was in the military service, he was not prejudiced or at all affected by the fact that the affidavit was not filed prior to entering default. This is also the holding in *Woytek v. King*, (1920), 218 S.W. 1081, (Texas Civil Appeals).

The next provision under paragraph (1) is that no order shall be made if the defendant is in service, until after the court shall have appointed an attorney to represent him and protect his interest and the court shall on application make such appointment. If the defendant is in default, and no affidavit has been filed by the plaintiff setting forth that defendant is, or is not, in the military service, the question for the court to decide is whether it is necessary to appoint an attorney to represent defendant to protect his interest, or whether a judgment or decree should be entered without such appointment. Another question incidentally arises under this provision as to whether the attorney, if appointed, is entitled to a fee for representing the defendant, and by whom such fee should be paid, or whether it should be charged as costs in the suit as in the case of an appointment of a guardian ad litem for minors and persons under disability in chancery and probate proceedings. You will note that the Act makes no provision for the payment of fees, and it was held under the 1918 Act that the attorney was not entitled to any fee. Those cases held that it was his patriotic duty in time of war to give his services free of charge for the defendant.

However, in a few cases decided under the 1940 Act, some of the courts have taken a different view and have held that the 1940 Act, not being a war time measure, an attorney appointed to represent persons who may be in the military service is entitled to be paid a fee as in cases in chancery and probate proceedings, where the court hearing the case was authorized to appoint an attorney to represent minors and persons under disability.

The next three cases relate to the allowance of fees.

(a) In *Davison v. Lynch*, 103 Misc. 311, 171 N. Y. Sup. 46, (Supreme Court, April, 1918), it was held that an attorney appointed by the court, as provided by the Soldiers' and Sailors' Civil Relief Act,

to represent defendant and protect his interest is not entitled to compensation for his services, and that every member of the Bar should regard it as a patriotic duty to devote his best efforts to the protection of a defendant in the military service, regardless of compensation.

The above case is under the 1918 Act, and two cases under the 1940 Act holding the opposite, are:

(b) *In re Cool's Estate*, 19 N. J. Misc. 236, 18 Atl. (2d) 714, (Orphan's Court of New Jersey, Warren County, March 12, 1941). Here, the Executor presented his account for confirmation and allowance and proof was submitted of the giving of notice. No appearance was made by any interested party except the executor. No affidavit as to military service was filed pursuant to the Soldiers' and Sailors' Civil Relief Act of 1940. Held that "in probate court proceedings in default of any appearance by an interested party, either male or female, an affidavit as to military service should be filed or other action taken in accordance with the Federal Act;" that an attorney should be appointed under the circumstances provided in the Act and such attorney should be allowed compensation in cases where allowances are commonly made according to the usual probate practice.

(c) The case of *Weynberg v. Downey*, 25 N. Y. Sup. (2d) 600, (Supreme Court, Kings County, January 29, 1941) was an action for mortgage foreclosure. One of the defendants owning a quarter interest in the property was in the military service of the United States. The court acting under the Soldiers' and Sailors' Civil Relief Act of 1940 appointed an attorney to represent the defendant "and protect his interest" as the Act provides. The question presented was whether the appointed attorney may be awarded compensation for his services. The Act makes no provision for compensation. The court held that the applicable or analogous practice is that governing compensation to a guardian ad litem (although the appointed attorney is not so called in the Act). The attorney was allowed taxable costs as an expense in the action.

In addition to the above provisions under paragraph (1) of Section 200 there is a further provision under paragraph (3) providing:

"but no attorney appointed under this Act to protect a person in military service shall have power to waive any right of the person for whom he is appointed or bind him by his act."

The questions naturally arising under this latter provision in case the court does appoint an attorney to represent a defendant who is in default, are: Does such attorney have the power (1) to file an appearance of the defendant and bind him; (2) to waive any right of the person for whom he is appointed; (3) to bind the defendant by any of his acts; (4) by answer for the defendant to waive any right he may have, and (5) does the appointment of an attorney to represent him deprive the defendant who is in military service of the right to appear during the period of his service, or within 90 days thereafter and make a meritorious or legal defense, if any he has, to the entry of the judgment or decree? The answers to all of these questions are in the negative. The attorney appointed to represent any defendant in the military service has no more power and authority to bind the defendant than a guardian ad litem who is appointed to represent minors and persons under disability. He cannot enter the appearance for the defendant and he cannot waive any right the defendant has to be heard, and although an attorney has been appointed to represent the defendant in military service, the defendant may appear, within the time provided by this Act, and if he has a meritorious or legal defense, the judgment should be vacated, with a provision that the vacation shall not impair any right or title acquired by any bona fide purchaser for value in reliance upon such judgment or decree. See *Davison v. Lynch, supra*, wherein the court held that the court may at any time vacate any judgment, *provided that the rights of a purchaser in good faith and for value under a judgment shall not be affected.*

FILING OF A BOND

A further provision under paragraph (1) of Section 200 is:

"Unless it appears that the defendant is not in such service the court may require, as a condition before judgment is entered, that the plaintiff file a bond approved by the court conditioned to indemnify the defendant, if in military service, against any loss or damage that he may suffer by reason of any judgment should the judgment be thereafter set aside in whole or in part."

In the many cases that I examined I found none in which the question of the bond being filed was involved. I also inquired of our chancery man and he informs me that he has not seen any case so far under the 1940 Act where the court has required a bond to be filed. If you get into the question of the filing of a bond, other questions arise, such as: will it be (1) a surety company bond, (2) a personal bond secured by real estate, (3) a bond by the plaintiff without

sureties or with sureties and (4) if with sureties, how many. The act makes no provision as to the kind of bond to be filed, leaving it entirely to the discretion of the Judge, which in my opinion is the only proper way it can be handled.

SOLDIERS AND SAILORS NOT EXEMPT FROM PROCESS, AND DECREES MAY
BE ENTERED AGAINST THEM, ALTHOUGH THEY ARE
KNOWN TO THE COURT TO BE IN SERVICE

Although it is known to the court that a defendant is in the military service, the court still has the discretion to allow the action to proceed to a judgment or decree against him or his property. Because a person is in the military service, does not exempt him from process, or because some other defendant is or was in military service does not give defendant not in service the right to ask to have a proceeding stayed or decree vacated.

For cases on these questions, see the three decisions following:

(a) In re petition of Institution for Savings in Newburyport, 309 Mass. 12, 33 N.E. (2d) 526, (Supreme Judicial Court of Mass. April 11, 1941), the court held that the Soldiers' and Sailors' Civil Relief Act of 1940 does not wholly prevent actions and judgments against persons "in military service" within the definitions of those words in Section 101(1), much less against other persons, and that under Section 200(1) a court may enter judgment against a person found not to be in military service, without requiring any affidavit that defendant is not in military service.

(b) *Tulley v. Superior Court for Alameda County*, 113 Pac. (2d) 477, (District Court of Appeals First District, Divn 1, California, May 26, 1941). Petition by a non-resident United States Army Officer who was in the State on official business for a writ of prohibition on the ground that he was not amenable to process in a civil action at the time he was served with process. Held that as a matter of public policy a member of the armed forces is not exempt from process in a civil action; that the Soldiers' and Sailors' Civil Relief Act of 1940 does not grant such exemption; that trial courts, either under the Federal Act or independently thereof, possess the power amply to protect the rights of those in the military service.

(c) The case of *John Hancock Mutual Life Insurance Co. v. Lester*, 234 Mass. 559, 125 N.E. 594, (Supreme Judicial Court, Suffolk, Mass. January 9, 1920), was an action to foreclose a mortgage of

\$3,500,000.00 on land in Boston held by the defendants as trustees under a realty trust. Under the realty trust equitable interests were evidenced by certificates for 30,000 shares having the face value of \$3,000,000.00, held by numerous persons, some of whom were in the military service. The shareholders were not made defendants. Held that failure to join the shareholders as parties did not prevent entry of an order of sale; that their interests were represented sufficiently by the trustees and the property was ordered sold in accordance with the power of sale contained in the mortgage because there was no showing that foreclosure would inequitably affect those shareholders in military service. No interest had been paid since October 1, 1917, and taxes were an increasing burden on the property. The trustees did not claim that the foreclosure was unwarranted, because of impaired ability of certificate holders to comply with the obligations because of military service. The hearing was held nearly 14 months after the signing of the armistice.

RIGHT OF DEFENDANT IN MILITARY SERVICE TO HAVE JUDGMENT
OR DECREE OPENED BY THE COURT

Section 200, paragraph (4) gives to any person in military service, not more than 90 days after the termination of such service, the right to have the judgment against him opened by the court rendering the same and such defendant or his legal representative let in to defend; provided it is made to appear that the defendant has a meritorious or legal defense to the action or some part thereof. You will note that this provision is limited to persons in military service and they must appear within the time provided by the Act, which is 90 days after the termination of service, and it must be made to appear to the court that the defendant has a meritorious or legal defense to the action or some part thereof. The defendant making the motion within the proper time to have the judgment rendered against him vacated because of being in the military service before the judgment was entered, must actually show facts indicating that he has a meritorious or legal defense to the action, or some part thereof. In other words, the mere statement of the defendant in his affidavit that he has a meritorious or legal defense to the action, or some part thereof, is not sufficient.

An illustration of the defective motion by the defendant to open up a decree will be found in the following case:

The case of *Combs v. Combs*, 180 N. C. 381, 104 S.E. 656, (Supreme Court of N. C., November 17, 1920), is an appeal from the de-

cision of the court denying a motion to set aside a decree of divorce rendered against defendant while in military service. The motion was filed by the defendant about 21 months after the entry of the decree and was on the ground that the decree was entered in violation of the Soldiers' and Sailors' Civil Relief Act. Service was by publication and no affidavit regarding military service was filed. At the time of the entry of the decree the defendant was in the Army, and was discharged from the Army January 14, 1919, more than 13 months prior to filing the motion to vacate. Held that the motion to vacate was properly denied, 1st, because defendant failed to file motion within 90 days after termination of his service in the Army, and 2nd, the defendant failed to show that he had a meritorious or legal defense to the action. In his motion the defendant failed "to set out that he has any defense to the cause of action as stated in the complaint. While he declares that he has a good and meritorious defense to said action, he fails to set out what that defense is. The statute says that it must be made to appear that the defendant has a meritorious or legal defense. It is not left to the defendant to say that his defense is meritorious or legal, but it must be made to appear so to the judge of the court; for that reason the defendant is required to set out the facts constituting his defense."

Also in the case of *Dietz v. Treupel*, 184 App. Div. 448, 170 N. Y. Sup. 108, (July 31, 1918), the Supreme Court (Appellate Division) although sustaining the lower court in the exercise of its discretion pointed out the deficiencies in the affidavit filed by the defendant.

Section 200, paragraph (4) provides

"Vacating, setting aside, or reversing any judgment because of any of the provisions of this Act shall not impair any right or title acquired by any bona fide purchaser for value under such judgment."

In my judgment this is one of the most important provisions of the Act and shows the care that was taken in drafting it. It is clearly the intention of Congress that a bona fide purchaser for value in reliance upon any judgment or decree rendered against a person in military service shall not be affected by the vacation, setting aside or reversing of any such judgment, although no affidavit has been filed, no attorney has been appointed and no bond filed. I have been unable to find any reported case where this provision of the Act has been involved. There is no doubt in my mind of the validity of this provision, because similar provisions have been on the statute books of the United States and of the State of Illinois for many years and have

been sustained as being valid. If it were not for this provision of the Act, no purchaser or mortgagee in reliance upon any order or decree would be protected from attack under the provisions of this Section. Hence, transfers of real estate would be frozen where a decree involving the title had previously been entered against any party who had not personally appeared and defended. You will note that the provision is "any bona fide purchaser for value under such judgment". This does not mean that the purchaser must acquire title under some judicial sale based on a decree or judgment, but means any bona fide purchaser for value in reliance upon any judgment or decree. Of course, the term "bona fide purchaser" includes a mortgagee loaning money.

When a motion to open up or vacate a judgment or decree has been made in due time by a defendant in the military service and a proper showing has been made that such defendant was prejudiced by reason of his military service in making his defense and that he has a meritorious or legal defense to the action or some part thereof, the court should open up the judgment, but in its order opening up such judgment the court should make provision for the protection of any bona fide purchaser or mortgagee who acquired rights in or to the property subsequent to the entry of the judgment or decree which is ordered re-opened. This is true whether or not the affidavit in regard to military service was filed and is true if the court did, or did not, appoint an attorney to represent such defendant and is also true if the court did, or did not, require the filing of a bond as provided in the act and although the defendant was actually in the military service.

RIGHTS OF PERSONS IN MILITARY SERVICE NOT LIMITED TO PERSONS WHOSE RIGHTS APPEAR OF RECORD

You will note that the rights of persons in military service to appear and be heard is not limited to persons whose rights appear of record. The courts have held that persons whose rights do not appear of record and who are in the military service have the same rights as those persons in military service whose rights do appear of record and who are made defendants to the action. You will readily see that if bona fide purchasers and bona fide mortgagees of real estate were not protected in reliance upon a decree or judgment, that it would be impossible for them by searching the record to ascertain whether any party in military service had been affected by any decree or judgment against the property. Although a decree may have been entered by

a court of competent jurisdiction adjudicating the fact that no parties interested were in military service, this still would not be binding upon any person in military service who was not a party to the suit. The difficulties of a purchaser or mortgagee finding out whether or not any defendant was in military service were pointed out in the case of *Hoffman v. Charlestown Five Cent Savings Bank*, 231 Mass. 324, 121 N.E. 15, (Supreme Judicial Court, Suffolk, Mass., November 26, 1918), wherein the court stated:

"The fact of the owner (when he is ascertained) being or not being in the military service of the United States, is a fact which it is at least as hard for the mortgagee to find out as it is for the mortgagee to find out who the owner of the property is."

For authority that parties in the military service whose rights are not disclosed of record have the same rights as persons in military service whose rights are disclosed of record, I refer you to the two cases following:

(a) In the case of *Hoffman v. Charlestown Five Cent Savings Bank*, 231 Mass. 324, 121 N.E. 15, (Supreme Judicial Court, Suffolk, Mass., November 26, 1918), the plaintiff, an officer in the military service of the United States brought a bill to get relief from the foreclosure of a mortgage under a power of sale made in violation of Clause 3 of Section 302, that is, without an order of court. It appears that the plaintiff being the record owner of the property in question and expecting to be called for service in the Army conveyed title to his mother in satisfaction of a third mortgage, but subject to a first and second mortgage. Thereafter it was orally agreed by plaintiff with his mother that the property should be his unless he failed to return from the Army. The defendant bank, during the period of plaintiff's military service foreclosed the first mortgage on the premises under a power of sale contained in the mortgage, sold the premises and was about to convey the same to the purchaser at the sale. The decree of the lower court dismissing the bill was reversed and a decree entered enjoining the defendant from conveying the mortgaged property to the person who bought it at the attempted foreclosure sale. The court held that the Soldiers' and Sailors' Civil Relief Act prohibiting foreclosure of mortgages against persons in military service without order of court is not limited to property used by such person or his dependents; that the rights under the Act are personal to the person in the military service and cannot be waived by another; that it is immate-

rial whether or not the mortgagee knows of the interest of the person in the military service and that the Act applies to equitable as well as legal interests in mortgaged property. The fact of the owner (when he is ascertained) being or not being in the military service of the United States is a fact which it is at least as hard for the mortgagee to find out as it is for the mortgagee to find out who the owner of the property is.

(b) Petition of Institution for Savings in Newburyport, 309 Mass. 12, 33 N.E. (2d) 526, (Supreme Judicial Court of Massachusetts, Essex, April 11, 1941). This was a proceeding in land court for the issuance of a certificate of title to petitioner as owner of land purchased by it at a sale under a power in a mortgage. An associate judge of the land court ordered the issuance of the certificate and reported to the Supreme Judicial Court the question of his right to make the order. The judge found as a fact that the foreclosure was regular and lawful and that

“the mortgagor is not now, and never has been, in military service within the meaning of the 1940 Act, nor has he ever made any conveyance, mortgage or pledge of the mortgaged premises to any person other than the petitioner.”

Held that there was no error in making the order in this case without requiring an affidavit regarding military service.

The court also held that Section 302(3) of the Act had no application where, as is found to be the fact in this case, no person affected by the foreclosure was or is in military service, and that there was no error in ordering the issuance of a new certificate of title.

The court also said that the question as to whether or not the new certificate of title would bar any person in military service who might have an interest in the foreclosed land from subsequently asserting the rights given him by Section 302(3) of the Soldiers' and Sailors' Civil Relief Act of 1940, was not before it and was not decided, and called attention to a state statute which provides that the certificate of title does not affect

“rights arising or existing under the laws or Constitution of the United States * * * which are not by law required to appear of record in the registry of deeds in order to be valid against subsequent purchasers or encumbrances of record.”

STAY OF ACTIONS

Section 201 provides as follows:

"At any stage thereof any action or proceeding in any court in which a person in military service is involved, either as plaintiff or defendant, during the period of such service or within sixty days thereafter may, in the discretion of the court in which it is pending, on its own motion, and shall, on application to it by such person or some person on his behalf, be stayed as provided in this Act, unless, in the opinion of the court, the ability of plaintiff to prosecute the action or the defendant to conduct his defense is not materially affected by reason of his military service."

You will note that Section 201 gives the right to either plaintiff or defendant and leaves the question of staying any action to the discretion of the court in which the suit is pending. I have been unable to find any case where the reviewing court has reversed the lower court in the exercise of its sound discretion in granting or refusing to grant a stay of an action and unless the lower court abuses its discretion, its decision will not be disturbed by the higher courts.

Some of the questions arising if either the defendant or the plaintiff is asking for a stay of the action are:

(a) Is either in the military service? (b) Is the ability of the plaintiff to prosecute the action or of the defendant to conduct his defense materially affected by reason of his military service? (c) Is the plaintiff or the defendant entitled to a stay of the proceedings because some important witness is in the military service? (d) Is the application for stay made within apt time?

Unless the ability of the plaintiff to prosecute the action is materially affected by reason of military service, his motion to stay should be denied, and unless the conduct of the defense is materially affected by reason of military service then motion to stay by the defendant should be denied.

I have talked with our chancery and judgment men working on abstracting proceedings in Cook County, and they informed me that they do not remember seeing any motions under the 1940 Act to stay proceedings except in cases where it has been claimed that some important witness is in the military service, such as a doctor or surgeon. The courts have granted stays where it appears that an important witness is in the military service.

The following six cases relate to the staying of actions:

- (a) *Stay of proceedings by lower court in exercise of its sound discretion will not be disturbed by reviewing court.*

The case of *Dietz v. Treupel*, 184 App. Div. 448, 170 N. Y. Sup. 108, (Supreme Court, Appellate Division, July 31, 1918), was a foreclosure suit, wherein the appellant moved for a stay of the entry of any possible deficiency judgment against him on the ground that he was a chief yeoman in the Naval Reserve and stated in his affidavit that he "has been obliged to almost entirely relinquish his civil business." Appellant was not the owner of the property but had a contingent liability by reason of having signed the bond secured by the mortgage being foreclosed.

Held, that although the lower court had no authority to stay the foreclosure suit by reason of the fact that a person in the military service might become liable on a possible deficiency, the reviewing court should not interfere with the exercise of discretion by the judge of the lower court upon the facts as presented to him. The Supreme Court did, however, point out the deficiencies in the affidavit filed by appellant.

- (b) *Section 201 leaves the granting of a motion to stay proceedings within the sound discretion of the court, which will not be disturbed on appeal unless there is an abuse of this discretion.*

In the case of *State ex rel. Clark v. Klene*, 201 Mo. App. 408, 212 S.W. 55, (St. Louis Court of Appeals, April 29, 1919), Clark, an army officer, obtained a decree of divorce, service being had by publication. Nine days after entry of the decree, the wife filed a motion to set aside the divorce on the grounds of fraud and defective service. The motion was set for hearing and prior to the date set, Clark, the husband, through his attorney, filed a motion to stay proceedings relying upon the Soldiers' and Sailors' Civil Relief Act. The motion recited that Clark was and had been for 20 months in the military service, that he had applied for leave "to be present at a divorce proceeding to which he was a party" and the application for leave had been refused. The lower court refused to grant the stay which was affirmed by this court.

The court held that Section 201 leaves the granting of a motion to stay proceedings within the sound discretion of the court, and in view of the facts as they appear from the record, the trial court did not exceed that sound discretion in refusing to stay the proceedings.

A similar holding is found in *Davies and Davies v. Patterson*, (1919), 137 Ark. 184, 208 S.W. 592.

(c) *Discretionary with court whether to grant a stay of eviction.*

Gilluly v. Hawkins, 108 Wash. 79, 182 Pac. 958, (Supreme Court of Washington, August 5, 1919). This was an action in unlawful detainer. A writ of restitution was issued. Defendant filed a motion to vacate for the reason that he was dependent upon a son who was in military service. The court suspended the writ for a period of more than 3 months. The Supreme Court held that under Section 300 of the Act, it rested in the discretion of the lower court to grant the relief prayed for in the complaint, and to issue the writ and as it could find no error in the exercise of the court's discretion therefore affirmed it.

(d) *Discretionary with court as to whether proceedings be stayed.*

The case of *Fennell v. Frisch's Admr.*, 192 Ky. 535, 234 S.W. 198, (Court of Appeals of Ky., May 27, 1921), was a suit for personal injury caused by an automobile driven by defendant. The accident occurred January 1, 1919 (after the Armistice). The defendant was in active service as Captain in the Ordnance Department, spent a considerable portion of his time at his home, which was in the same county and apparently continued to operate his contracting business. The court held that it was not error to refuse a stay on the ground that defendant was in the military service; that while technically the defendant came within the Soldiers' and Sailors' Act, the nature of his military service was not such as to interfere with his ability to appear and defend. The question whether proceedings against a person in the military service of the government should be stayed is discretionary with the trial court.

(e) *Sailor granted stay of foreclosure of mortgage on home under 1940 Act.*

The case of *Cortland Savings Bank v. Ivory*, (1941), 27 N. Y. Sup. (2d) 313, was an action to foreclose a mortgage. The mortgagor and his wife filed a motion pursuant to Section 302 of the Soldiers' and Sailors' Civil Relief Act of 1940 for a stay of the proceedings to foreclose a mortgage on their home. The mortgagor was in active service in the Navy. The court granted a stay upon condition that the mortgagor pay a sum each month to cover taxes and interest on the unpaid balance of the mortgage.

- (f) *Clerk of Court unwarranted in refusing to issue writ for possession against a tenant unless an affidavit was filed that tenant was not in military service.*

The case of *People ex rel. Regonlot v. Byrne*, 189 N. Y. Sup. 916, (Supreme Court, Kings County, March 10, 1921), was an action for rent which the tenant defended on the ground that the rent demanded was unreasonable. After trial judgment was rendered in favor of landlord, and tenant was given 5 days to pay rent and costs. The tenant failed to make the payment and the landlord applied to the clerk of court for a warrant. The clerk refused to issue the warrant, unless an affidavit was filed showing that the tenant was not in military service.

Held that the action of the clerk was unwarranted because the defendant had appeared in the action and defended the same in person, so that the question of military service was wholly superseded by and included in the judgment.

STAY AGAINST WIFE WHERE HUSBAND IS IN MILITARY SERVICE

It has been held in one case at least that the wife of a husband in military service could not have a stay of action in an ejectment suit against her, under the provisions of the Soldiers' and Sailors' Civil Relief Act of 1940. The husband, of course, was not a party to the ejectment suit as the ejectment statute only required the party in possession to be made a party. However, in another case the wife of a sailor was granted a stay under the 1940 Act similar in all respects to that granted to her husband in an action for joint liability against both as owners of an automobile. The two cases referred to are:

- (a) *Held that wife of a husband in military service could not stay action in ejectment against her, under the provisions of the Soldiers' and Sailors' Civil Relief Act.*

Union Labor Life Insurance Company v. Wendeborn, 21 Atl. (2d) 317, (Advance Sheet No. 3 dated August 30, 1941), (Supreme Court of New Jersey, Camden County, decided July 14, 1941). This was an ejectment suit brought by the owner and holder of a mortgage, on the premises involved, made by the defendant and her husband. The plaintiff alleged that there was default in a payment and that it had

exercised its option to declare entire balance due and was entitled to possession which had been demanded and refused. The defendant and her husband held title as tenants by the entirety. The husband was in active military service and was not made a party.

The defendant filed an answer setting up three separate defenses: (1) That her husband was in active military service and that the cause of action is barred by the Soldiers' and Sailors' Civil Relief Act of 1940, (2) that the alleged remedy is barred by said Act of Congress, and (3) that the cause of action is barred by reason of the failure to join her husband as a party defendant. A motion was made to strike the answer.

The court held that Section 200 of the Act requiring the filing of affidavit regarding military service did not apply as defendant was not in such service; that Section 300 of the Act deals with the subject of distress or ejection of the wife, children or other dependents of a person in military service where the rent does not exceed \$80.00 per month; that these provisions relate to landlord and tenant actions, precede the sections of the Act dealing with mortgages, are quite different and obviously are intended to apply to different situations. Consequently the first and second defenses present no defense to this suit. As to the third separate defense, it was not necessary to make the husband a party as the suit would not affect his title and persons not in possession are not required to be made defendants in an ejectment suit. The motion to strike was granted.

(b) *Wife of sailor granted a stay under 1940 Act, similar in all respects to that granted to the husband.*

The case of *Griswold v. Cady*, 27 N. Y. Sup. (2d) 302, (Supreme Court, Queens County, April 16, 1941), was an action against Cady and his wife involving liability as operators and owners of an automobile. The court had previously stayed the proceedings as to Cady who was serving in the Navy but had denied a motion for a stay as to the wife.

It appeared that the husband and wife were the joint owners of the automobile in question and any liability as owners of the vehicle would be a joint liability. On rehearing the court held that the case came within the purview of Section 103, subdivision (1), of the Soldiers' and Sailors' Civil Relief Act of 1940 and granted a stay as to the wife, similar in all respects to that granted to the husband.

EXCLUSION OF MILITARY SERVICE FROM PERIODS OF LIMITATION

Section 205 provides:

"The period of military service shall not be included in computing any period now or hereafter to be limited by any law for the bringing of any action by or against any person in military service or by or against his heirs, executors, administrators, or assigns, whether such cause of action shall have accrued prior to or during the period of such service."

You will note in this section that the period of military service shall not be included in computing the time for the bringing of any action by or against any person in military service, although the time had started to run prior to military service. (*Ebert v. Poston*, 266 U. S. 548, shown here page 29). The section applies as well to the plaintiff as to the defendant. In other words, if a person has a claim against another who is in military service he does not have to bring his action against such person until after the termination of such military service. This is explainable upon the theory that if the plaintiff started his action against a defendant in the military service, the court would have the right to stay the proceedings, so why start the proceedings before the defendant returns from service. This limitation applies to the bringing of any action whether the time for the bringing of the action is fixed by law or by contract. It has been held that the Act (a) extends the time for bringing suit under an insurance policy, although the insurance policy contained an express provision limiting the time to bring any action thereunder. It also has been held that this section applies to the time for bringing the following actions or claims: (b) mechanic's lien claims where the law bars a claim unless a suit is filed within one year after the claim accrued; (c) an action on a contract obligation, such as a promissory note; (d) for bringing a suit to recover damages for certain personal property sold by the defendant during the period the plaintiff was in military service; (e) to the bringing of a suit for damages for personal injuries; (f) to actions of libel; (g) for filing a mandate of the reviewing court; (h) for filing claims against an estate; (i) for filing a claim for title against persons who have been in possession under either the 7 or 20 year limitation statutes.

The cases supporting those views are as follows:

- (a) *Time for bringing suit for loss under conditions in insurance policy, extended under Soldiers' and Sailors' Civil Relief Act.*

The case of *Steinfeld v. Mass. Bonding and Ins. Co.*, 80 N. H. 39, 112 Atl. 800, (Supreme Court of N. H., January 4, 1941), was a

suit upon a policy of indemnity insurance. The policy provided that suit must be brought within 90 days after loss. The suit was not brought until 4 or 5 months after loss, but during this period the plaintiff was in the military service of the United States. It was argued by the insurance company that the time for bringing suit was limited by the contract and not by "any law," and that therefore the Soldiers' and Sailors' Civil Relief Act does not apply. Held that the Soldiers' and Sailors' Civil Relief Act is not limited to statutory provisions. It applies to all law, and provides, in substance, that notwithstanding the State Law limits the action as by contract agreed, that law shall not apply while the plaintiff is in the service and that the present case is within the spirit and intent of the Act. The purpose of the Act was to extend the time for bringing actions generally.

(b) *Mechanic's Lien: Time for enforcement extended by Act.*

In the case of *Clark v. Mechanics' American National Bank*, 282 Fed. 589, (Circuit Court of Appeals, 8th Circuit, August 24, 1922), the appellant claimed a lien under an Arkansas Statute providing for mechanic's liens upon a railroad, and also providing that the lien

"shall not be effectual unless suit shall be brought upon the claim, or the claim shall be filed by order of court with the receiver of said railroad within one year after said claim shall have accrued."

Appellant did not bring suit within a year after the claim accrued, unless the period of his military service be excluded; if so excluded the suit was timely. The lower court held that Clark was not entitled to enforce the lien. It was contended that the Soldiers' and Sailors' Civil Relief Act did not govern the case as it was only intended to modify those statutes properly called statutes of limitation. Held that the meaning and purpose of the Act was to extend the time in which an action could be brought by or against the person in military service, whenever any limitation had been, or was thereafter, fixed by any law, for the bringing of the action, and that it applied to every form of action whether arising under statute or otherwise, and whether the statute granted the right to sue or merely limited the time for suit. (Cites: *Steinfeld v. Mass. Bonding and Ins. Co.* (N. H.), 112 Atl. 800; *Halle v. Cavanaugh* (N. H.), 111 Atl. 76; *Stewart v. Kahn*, 11 Wall. 493, 20 L. Ed. 176).

(c) *Time for bringing action on contract obligation extended by period in service.*

In the case of *Erickson v. Macy*, 231 N. Y. 86, 131 N.E. 744, (Court of Appeals of New York, April 19, 1921), the court held that

the time for bringing an action on a contract obligation (promissory note), as fixed by the statute, was extended by the Soldiers' and Sailors' Civil Relief Act by the period the defendant was engaged in military service.

This suit was on a promissory note. The defendant entered the military service prior to the bringing of the suit and the particular question involved in the case was whether the motion to vacate the order of the court for service by publication under the state statute, should be allowed. Held that the court did not have authority to grant the order of publication and that the Soldiers' and Sailors' Civil Relief Act extended the time for bringing the action.

(d) *Time to recover damages for conversion of personal property, extended by period in service.*

The case of *Kosel v. First National Bank of Ashley*, 55 N. Dak. 445, 214 N.W. 249, (Supreme Court of N. D., June 1, 1927), was a suit to recover damages for certain personal property alleged to have been sold by defendant and converted to its own use during the period that plaintiff was in military service. Plaintiff alleged that he was in the military service from March 27, 1918 to November 26, 1919 and that the alleged sale and conversion was during the period of such military service. The defendant answered that the plaintiff had failed to bring said action within the period prescribed by the laws of North Dakota and is therefore barred by the statute of limitations.

The court held that the plaintiff was entitled to deduct this period of service in computing the time in determining whether the state statute of limitation bars him.

(e) *Time to file suit for damages for personal injuries extended.*

The case of *Bell v. Baker*, Receiver of International and Great Northern Railway, 260 S.W. 158, (Commission of Appeals of Texas, 1924), was a suit for damages for personal injuries. The statute of limitations was pleaded and it was held that the period of plaintiff's military service should not be included in computing the period of limitation. In other words the limitation Act was extended by the period of plaintiff's military service.

(f) *Time for filing action for libel extended.*

The case of *Lewis v. Anthony Republican Publishing Company*, 111 Kan. 653, 208 Pac. 254 (Supreme Court of Kansas, July 8, 1922), makes a similar holding that the period plaintiff was in the military service cannot be computed as part of the period within which an action of libel may be brought.

(g) *Time for filing mandate of reviewing court extended.*

In the case of *Kuehn v. Neugebauer* (1919 Texas Civil Appeals), 216 S.W. 259, judgment for plaintiff was reversed and the cause remanded to the trial court for a new trial. The Texas statutes provided that before a mandate should issue to the trial court, the costs must be paid and mandate taken out within one year from the date of the judgment of the reviewing court and that if this is not done, the case shall be dismissed. After the expiration of the one year period, appellee paid the costs and requested the clerk to issue the mandate, which the clerk refused to do, on the ground that the costs were not paid within one year. The appellee filed a motion that the reviewing court instruct the clerk to issue the mandate on the grounds that he was in the military service and that he paid the costs as soon as he reasonably could and within 30 days after his discharge from military service. The court ordered the issuance of the mandate to the trial court and said that the period of appellee's military service should not be included in computing the year.

(h) *Corporation having claim against an estate gets no extension of time to file claim, because an officer of the corporation handling claim is in military service.*

In the case of *Bolz Cooperage Corp. v. Beardslee*, 211 Mo. App. 109, 245 S.W. 611, (St. Louis Court of Appeals, Missouri, December 5, 1922), it was held that a corporation having a claim against an estate and failing to file the same within the year allowed by statute, did not benefit under the Soldiers' and Sailors' Civil Relief Act, although the officer handling the transaction out of which the claim grew was in the military service; that the period of his service could not be used to extend the time for filing the claim. The court further stated after discussing the definitions under the various subsections under Section 101,

"We are jealous to liberally construe the Soldiers' and Sailors' Civil Relief Act so as to effectuate its purpose, but we cannot

read into the Act something which is not therein contained and which is clearly excluded."

- (i) *Limitation Statutes, such as 20 year and 7 year periods for asserting claim of title, does not run against the parties during the period they are in military service.*

The case of *Easterling et al. v. Murphy*, 11 S.W. (2d) 329, (Texas Civil Appeals, 1928), was a suit by the heirs of a deceased soldier to try title to an interest in land. Defendants pleaded the 20 year statute of limitations. Held that the heirs of such deceased soldier were entitled to have the period of his military service deducted in computing the period of limitation for the bringing of the action.

TIME FOR REDEMPTION FROM FORECLOSURE SALE NOT EXTENDED—
RIGHT TO REDEEM NOT A RIGHT OF ACTION

The decisions hold that the time for redeeming from a foreclosure sale or judicial sale is not extended by Section 205 of this Act and although some statutes provide that the owner of the property must file a suit in order to redeem, nevertheless it is held that the time for making this redemption and filing the suit is not extended by this section. This is supported by a decision of the United States Supreme Court, (Justice Brandeis) and will be found in *Ebert v. Poston*, 266 U. S. 548, (January 12, 1925). In this case the United States Supreme Court said that the Soldiers' and Sailors' Civil Relief Act of 1918 did not extend the period of redemption from a foreclosure sale made prior to the passage of the Act and that the broad purpose of the Act would not make other sections include matters not covered thereby and that this Act is drawn with care, and comprehensively, systematically and in detail deals with a single subject and that the right to redeem is not a right of action, but is a primary right as distinguished from a remedy. In other words the United States Supreme Court held that the right to redeem is not a right of action. Cases in other states have supported this view and I did not find any reported case in any court where the time for redemption from a foreclosure sale or judicial sale had been extended by the provisions of this Act.

The cases supporting the position that the time for redemption is not extended are:

(a) *Redemption period not extended—Right to redeem is not a right of action, but is a primary right as distinguished from a remedy.*

Ebert v. Poston, 266 U. S. 548, (January 12, 1925, Certiorari to Supreme Court of Michigan). In this case Poston brought suit to redeem a parcel of land from a foreclosure and sale made under a power of sale in the mortgage pursuant to the statutes of Michigan. The statutes provide that a deed to the purchaser at the sale shall be deposited with the register of deeds which shall vest title in the grantee at the expiration, without redemption, of one year from the date of sale. The foreclosure sale under the power contained in the mortgage was made on February 5, 1918. There was no redemption within the year and after February 5, 1919 the deed was delivered to the purchaser. Poston claimed a right of redemption by reason of the Soldiers' and Sailors' Civil Relief Act which was passed about one month after the sale. Poston entered the Army on September 29, 1918 and was discharged on May 14, 1919 and on July 24, 1919 attempted to redeem from the foreclosure sale.

The lower court dismissed the bill and on appeal the Michigan Supreme Court held that, by reason of the Soldiers' and Sailors' Civil Relief Act, the one year period for redemption had been extended by the time Poston had been in the military service, and therefore that the period for redemption, so extended, had not expired when Poston attempted to redeem. It should be borne in mind that the foreclosure sale was made prior to the passage of the Act. Judge Brandeis in his opinion in this case refers to Section 302, relating to the enforcement of mortgages, and to Section 205, relating to limitations of actions. With respect to Section 302, the court, on page 553, said:

"A decree of foreclosure may be stayed, or otherwise disposed of, under Section 302 only if the suit was commenced after the passage of the Act and during the period of military service. And, likewise, it is only sales made after the passage of the Act and during military service that are invalidated if made without leave of court."

With respect to the extension of periods of limitation, the court, on page 553, said:

"Section 205 does not apply to transactions which are effected without judicial action. The statutory right to redeem from a sale by advertisement is not a right of action. It is a primary right as distinguished from a remedy. * * * The bill in equity is merely the remedy by which the right, if still existing, may be enforced."

The decision of the Michigan Supreme Court was held to be erroneous and was reversed.

(b) *Time for redemption not extended. Not a right of action under limitation statute.*

In *Wood v. Vogel*, 204 Ala. 692, 87 So. 174, (Supreme Court of Ala., December 16, 1920), a bill was filed to redeem from foreclosure sale under a power. The property had been sold by the lien holder on November 27, 1916 under a power of sale. The period of redemption normally expired, under Alabama laws, on November 27, 1918. The property was purchased by a third party, and by mesne conveyances passed to the defendant, Mrs. Wood, on November 4, 1918. At the time of the foreclosure sale, and prior thereto, complainant, Vogel, was in the military service of the United States and so remained until May 19, 1919.

The theory of the bill was that the normal period of redemption was extended by the Soldiers' and Sailors' Civil Relief Act by the elimination from that period of the term of his military service, namely, from March 8, 1918 to May 18, 1919. The defendant demurred and the demurrer was overruled by the lower court. The lower court was reversed and the Supreme Court which held that Section 205 of the Act did not extend the period of redemption, said: "The right of Redemption * * * is not a property right, but is a mere personal privilege accorded by statute, to be exercised in the manner and within the time prescribed by law. * * * It is not a right of action in the sense in which statutes of limitation are applicable, and the prescription of a period of two years within which the privilege must be exercised does not create a statute of limitations. * * * It is clear, we think, that the quoted section (Section 205) of the Civil Relief Act, extending periods of statutory limitation for the bringing of actions by or against any person in military service, does not apply to the periods of statutory redemption here involved, and we are satisfied that such an extension of its protective purpose was not intended by the Congress."

ENFORCEMENT OF MORTGAGE OBLIGATIONS

Section 302 provides as follows:

"(1) The provisions of this section shall apply only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed, or other security in the nature of a mortgage upon real or personal property owned

by a person in military service at the commencement of the period of the military service and still so owned by him.

(2) In any proceeding commenced in any court during the period of military service to enforce such obligation arising out of nonpayment of any sum thereunder due or out of any other breach of the terms thereof occurring prior to or during the period of such service the court may, after hearing, in its discretion, on its own motion, and shall, except as provided in section 303, on application to it by such person in military service or some person on his behalf, unless in the opinion of the court the ability of the defendant to comply with the terms of the obligation is not materially affected by reason of his military service—

(a) stay the proceedings as provided in this Act; or

(b) make such other disposition of the case as may be equitable to conserve the interests of all parties.

(3) No sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any such obligation shall be valid if made during the period of military service or within three months thereafter, unless upon an order of sale previously granted by the court and a return thereto made and approved by the court."

You will note that this Section 302 applies only to obligations originating prior to the date of approval of this Act and secured by mortgage, trust deed or other security in the nature of a mortgage upon real or personal property owned by a person at the commencement of the period of military service and still so owned by him. This means that all obligations made after the date of approval of this Act and secured by mortgage or trust deed are not affected by this section.

You will also note that this section does not prohibit the foreclosure of mortgages on property owned by a person in the military service, and makes it discretionary with the court to stay the proceedings, or to permit the foreclosure and sale, or to make such other disposition of the case as may be equitable to protect the rights of all parties.

Paragraph (3) of Section 302 provides that no sale under a power of sale or under a judgment entered upon warrant of attorney to confess judgment contained in any obligation secured by mortgage, trust deed or other security in the nature of a mortgage, shall be valid if made during the period of such service unless made upon an order granted by the court and a return thereto made and approved

by the court. The provision that a sale under a confession judgment to be valid must be made upon an order of court applies only to confession judgments entered upon an obligation originating prior to October 17, 1940 and secured by a mortgage or trust deed. There is no provision in the Act requiring such order of court with reference to a sale under a confession judgment entered upon an obligation not secured by a mortgage. Why there should be any distinction made between confession judgments entered on the two kinds of obligations, I do not know. It would seem in most cases that a person holding an obligation containing a warrant of attorney and secured by mortgage would proceed to foreclose the mortgage rather than to have a confession judgment entered, unless he intended to reach property not subject to the mortgage. The entry of a confession judgment on an unsecured obligation, whether such obligation was executed before or after the effective date of the Act, would no doubt be governed by the provisions of Section 200 with reference to the filing of an affidavit, the appointment of an attorney and the requirement that a bond be filed. It would also seem that in connection with the redemption from a judicial sale by a judgment creditor, it would be necessary to ascertain, in the event the judgment was a confession judgment, that it was not based on an obligation originating prior to October 17, 1940 and secured by a mortgage or trust deed.

Most of the decisions relating to foreclosure of mortgages are principally concerned with the foreclosure by sale under a power. We, in this state, are not greatly concerned with questions relating to foreclosure sales under a power, except as to personal property. However, the Massachusetts Supreme Judicial Court has held that a sale under a power is good, although not made under an order of court, if no person interested in the property sold was in fact in the military service, the chief difficulty being in subsequently proving that no person in the military service had any interest in the property foreclosed.

The same court upheld the lower court in ordering the foreclosure of a mortgage of three and one half million dollars, although a number of persons owning equitable interests in the property foreclosed were in the military service. This last holding was based on the ground that such persons were represented sufficiently by the trustees in title and that there was no showing that foreclosure would inequitably affect the interest of the persons in military service. This holding is in the case of *John Hancock Mutual Life Insurance Co. v. Lester*, *supra*.

FORECLOSURE SALE UNDER POWER NOT INVALID BECAUSE MADE
WITHOUT ORDER OF COURT IF PURCHASER CAN SHOW THAT
OWNERS WERE NOT IN MILITARY SERVICE

The case of *Morse v. Stober*, 233 Mass. 223, 123 N.E. 780, (Supreme Judicial Court, Suffolk, Mass., June 23, 1919), was a suit for specific performance of an agreement to buy real estate, the defendants having refused to carry out the contract on the ground that plaintiff's title was acquired by sale under a power of sale to foreclose a mortgage on the premises in question without an order of court as required by the Soldiers' and Sailors' Civil Relief Act. The court determined that the owners were not in military service and ordered the vendee to accept title.

The court said that the safe course for a mortgagee is to foreclose his mortgage under the order of a court of equity, for in that way alone will he get a record title not open to successful attack under the Act. If he forecloses his mortgage under a power of sale, without an order of court, during the period specified by the Soldiers' and Sailors' Civil Relief Act, he assumes the burden of proving that no person in the military service the United States had any interest in the property foreclosed.

CONCLUSIONS

From my study of the Act and decisions, I have formed certain conclusions which may be summarized as follows:

1. The Act is constitutional.
2. The requirement as to filing an affidavit with respect to military service is not jurisdictional.
3. A judgment or decree entered against a defendant in default without the filing of an affidavit is valid, is not subject to collateral attack on that ground and cannot be set aside or vacated on motion by a defendant not in military service.
4. A judgment or decree by default against a defendant in the military service will not be opened or vacated except on a motion made in proper time and a showing that he was prejudiced by reason of his military service in making his defense and that he has a meritorious or legal defense.
5. An affidavit filed prior to entry of judgment or decree is filed in apt time although not filed prior to entry of default order.

6. The appointment of an attorney to represent a defendant in military service does not affect the right of the defendant to have the judgment or decree vacated or set aside upon a motion made in due time and supported by a proper showing.
7. Although it is known to the court that a defendant is in the military service, the court may, in its discretion, enter a judgment or decree against such defendant or his property.
8. When a judgment or decree has been entered against a person in the military service or against his property, the defendant has the right to have such judgment or decree opened by the court, provided he makes his motion within due time and makes a proper showing that (a) he was in the military service, (b) by reason of such service he was prejudiced in making his defense, and (c) he has a meritorious or legal defense. This right exists irrespective of whether or not an affidavit respecting military service was filed or an attorney to represent him was appointed or a bond given.
9. The protection afforded by Sections 200 and 302 of the Act extends to all persons in the military service having rights affected by the litigation although their rights do not appear of record.
10. The granting of a stay order in any action rests in the discretion of the court.
11. The court in vacating or opening a decree or judgment under the provisions of Section 200 of this Act, should provide in the order that nothing contained therein shall be construed as affecting or impairing any right or title acquired by any bona fide purchaser or mortgagee for value subsequent to the entry of the decree or judgment so vacated or opened.
12. The time for bringing any action by or against any person in the military service is extended by Section 205 of the Act, whether the time for bringing such action is fixed by statute or by contract. The period of military service shall not be included in computing the time, although the time had started to run prior to entering the service.
13. The time for making redemption from judicial sales is not extended by Section 205 of the Act.
14. The Act does not prohibit the foreclosure of mortgages on property owned by a person in the military service, but makes it discretionary with the court to stay such foreclosure or to permit

the foreclosure and sale or to make such other disposition of the case as may be equitable to protect the rights of all parties.

15. An attorney appointed by the court to represent a person in the military service should be allowed such fees as are ordinarily allowed in a similar proceeding to an attorney appointed by a court to represent minors or persons under disability.
16. An attorney appointed by a court to represent a person in military service cannot waive any of his rights nor file his appearance nor bind him by any answer filed for him. The person in military service must be served with process and the appointment of an attorney to represent him does not take away any of his rights under this Act.
17. A sale of property owned by a person in the military service under a judgment confessed on a judgment note executed prior to October 17, 1940 and secured by a mortgage or trust deed, is not valid.
18. In any action or proceeding in any court, where there is a default of any appearance by a defendant, the court before entering any judgment, decree or order should require that an affidavit respecting military service be filed as provided in Section 200 of the Act. The filing of an affidavit before the entry of an order in a proceeding does not satisfy the requirement for another affidavit before the entry of a subsequent order in the same proceeding. For instance, if an affidavit regarding military service had been filed before entry of a decree of foreclosure or decree of partition, a new affidavit should be filed before entry of an order approving the sale.
19. The requirement under Section 200 for filing an affidavit respecting military service applies to proceedings in any court. The Probate Court of Cook County has entered a general order reminding attorneys of its requirement relative to filing affidavits as to military service covering defendants or respondents in various proceedings, to wit:
 - (a) Petition for admission of will to probate, (b) Petition for appointment of an administrator, guardian, or conservator, (c) Final account of executor, administrator, guardian, or conservator, (d) Petition to sell real estate. (Chicago Bar Record. October 1941, page 18).
20. Before the entry of a confession judgment, an affidavit as to military service should be required, as the appearance of the

defendant by an attorney authorized under the warrant of attorney does not satisfy the requirements of Section 200.

21. "Persons in military service" as defined by the Act includes females.
22. The Attorney General has given an opinion that the Act is applicable to all agencies of the Government, and particularly to the several lending programs of the Department of Agriculture. (85 Housing Legal Digest, pages 18-19, September, 1941).
23. The Act contains no provision (other than the fine of \$1,000.00 and one year imprisonment for false affidavit) for reimbursement to a person in the military service who has been deprived of his property by the erroneous entry of a judgment, order or decree. His remedy would be against the party who benefited by the judgment, order or decree.
24. The fact that the record discloses a defendant to be in military service does not prevent a purchaser from being a bona fide purchaser nor affect or impair any right or title acquired by him.
25. Persons in military service may be deprived of their property by a judgment or decree and be without remedy other than a suit for damages against the party who benefited by the judgment or decree. It, therefore, is desirable that the court, with the aid and cooperation of the attorneys, exercise the greatest care to protect the rights of persons who are, or may be, in the military service.
26. The courts have held that it is their duty when assuming jurisdiction over one in military service to see to it that he is properly represented by attorney and the action stayed unless his interests will not be materially affected or he is by bond indemnified. (*Howie Mining Co. v. McGary*, 256 Fed. 38.)

FORMS

The following are forms of affidavit as to military service furnished by the Clerks of the Circuit, Superior and Probate Courts of Cook County, Illinois, and the Municipal Court of Chicago for use in their respective courts.

Attention is directed to the fact that there are two forms of affidavit for use in the Probate Court, one in connection with final accounting, etc. and one in connection with proceedings to sell or mortgage real estate.

AFFIDAVIT AS TO MILITARY SERVICE

STATE OF ILLINOIS, }
COUNTY OF COOK }ss.

CIRCUIT COURT OF COOK COUNTY.

	<i>Plaintiff</i>	
<i>vs.</i>		
	<i>Defendant</i>	

General Number

Affidavit As To Military Service of Defendant

I, ..., being first duly sworn, on oath, state:
 My age is years.
 I reside at
 My occupation is
 I am the plaintiff in the above entitled and numbered cause and as such have full knowledge of the facts relating thereto.
(1), (2) and (3)

Said defendant, ...
(Insert name of defendant here)

is not in the military service of the United States.

(3) I am unable to determine whether or not defendant is in the military service of the United States.

I further state that this affidavit is made in compliance with the provisions of the Soldiers' and Sailors' Relief Act, signed by the President October 17, 1940; the National Guard Act, passed by Congress August 27, 1940, and the Selective Training and Service Act of 1940, passed by Congress September 16, 1940.

Subscribed and sworn to before me
 this day of 194....

Notary Public

- (1) If defendant *is* in military service strike out word "not."
- (2) If affiant swears that the defendant is *not* in military service he should state facts upon which he bases this statement in the space left blank.
- (3) Strike out sentence not applicable.

AFFIDAVIT AS TO MILITARY SERVICE

Form 287

STATE OF ILLINOIS, }
 COUNTY OF COOK } ss.

SUPERIOR COURT OF COOK COUNTY

Plaintiff....

vs.

General Number

Defendant....

Affidavit As To Military Service of Defendant

I, ..., being first duly sworn, on oath, state:

My age is.....years.

I reside at.....

My occupation is.....

I am the plaintiff in the above entitled and numbered cause and as such have full knowledge of the facts relating thereto.

(1), (2) and (3)

Said defendant, ...

(Insert name of defendant here)

is not in the military service of the United States.

(3) I am unable to determine whether or not defendant is in the military service of the United States.

I further state that this affidavit is made in compliance with the provisions of the Soldiers' and Sailors' Civil Relief Act, signed by the President October 17, 1940; the National Guard Act, passed by Congress August 27, 1940, and the Selective Training and Service Act of 1940, passed by Congress September 16, 1940.

Subscribed and sworn to before me

this.....day of.....194....

Notary Public

(1) If defendant is in military service strike out word "not."

(2) If affiant swears that the defendant is *not* in military service he should state facts upon which he bases this statement in the space left blank.

(3) Strike out sentence not applicable.

AFFIDAVIT AS TO MILITARY SERVICE

Form 270

(THIS FORM TO BE USED IN PROCEEDINGS FOR SALE OR MORTGAGE, ETC. OF REAL ESTATE.)

STATE OF ILLINOIS, }
COUNTY OF COOK } ss.

IN THE PROBATE COURT OF COOK COUNTY

In the Matter of the Estate of

} Docket
Page
File

.....
..... Plaintiff
vs.
.....
..... et al, Defendants

AFFIDAVIT AS TO MILITARY SERVICE OF DEFENDANT

I, ..., being duly sworn, on oath state:

1. My age is.....years. I reside at.....
My occupation is..... I am the plaintiff in the above
entitled cause and as such have full knowledge of the facts relating thereto.
(See footnotes a, b and c)
2. The defendant.....is not in
(insert name of defendant)
the Military Service of the United States.
(see note b)
3. I am unable to determine whether or not the defendant.....
.....is in the Military Service of the United States.
4. I further state that this affidavit is made in compliance with the provisions
of the Soldiers' and Sailors' Civil Relief Act, signed by the President October
17, 1940; the National Guard Act, approved on August 27, 1940; and the
Selective Training and Service Act of 1940, approved on September 16, 1940.
5. I further state that.....
(see note a)

(Signed)
Subscribed and sworn to before me this
.....day of.....19.....

Notary Public

- (a) If affiant swears that the defendant is not in the Military Service, he should
state facts on which he bases this statement in the space left blank at No. 5.
- (b) If defendant is in Military Service strike out word "not".
- (c) Strike out sentences not applicable.

AFFIDAVIT AS TO MILITARY SERVICE
(THIS FORM TO BE USED IN FINAL ACCOUNTING, ETC.)

Form 271

STATE OF ILLINOIS, }
COUNTY OF COOK }ss.

IN THE PROBATE COURT OF COOK COUNTY

In the Matter of the Estate of

} Docket
} Page
} File

AFFIDAVIT AS TO MILITARY SERVICE

I, _____, being duly sworn, on oath state:

1. My age is _____ years. I reside at _____
My occupation is _____
2. I am the administrator—executor—petitioner
(See Note (b))
in the above estate and have full knowledge of the facts relating thereto.
(See Notes (a) and (b))
3. (a) That the following named persons, entitled to share in the above estate as heirs at law, devisees or legatees, or who are interested therein as unpaid creditors, have not entered their appearances in writing and waived notice or have not filed their receipts in full.

(Insert names here)

That, except as stated in paragraphs (b) and (c) hereof, none of the persons above named is in the Military Service of the United States.

(b) That of the persons above named,
_____ are (is) in the Military Service of the United States.

(See Note (b))

(c) That I am unable to determine whether or not the following persons, named at No. 3 (a) above, are in the Military Service of the United States:

(Insert names here)

4. I further state that this affidavit is made in compliance with the provisions of the Soldiers' and Sailors' Relief Act, signed by the President of the United States on October 17, 1940; the National Guard Act, approved on August 27, 1940; and the Selective Training and Service Act of 1940, approved on September 16, 1940.
5. I further state that _____

(See Note (a))

(Signed).....

Subscribed and sworn to before me this
day of _____ 19 ____.

Notary Public

- (a) If affiant swears that any of the persons named at No. 3 (a) is not in the Military Service, he should state facts upon which he bases this statement in the space left blank at No. 5.
(b) Strike out words or sentences not applicable.

SEE REVERSE SIDE HEREOF FOR EXCERPT OF SECTION 200 OF SOLDIERS' AND SAILORS' RELIEF ACT OF 1940.

The Municipal Court of Chicago

Plaintiff ---
vs.

No.

Defendant---

Affidavit As To Military Service of Defendant

I, _____, make oath and say as follows:

1. My age is ----- years, my residence -----
and my occupation-----.

2. I am the _____ plaintiff in the above
entitled action and as such have full knowledge of the facts relating thereto.

1. Said defendant--- is in the military service of the United States.

2. Said defendant---- is not in the military service of the United States.

3. I am not able to determine whether or not defendant is in such service.
(Strike out sentences not applicable).

4. I further state that*.....

Subscribed and sworn to before

me this day

of _____, 19_____.

.....
Notary Public.

*In No. 4 set forth facts upon which affidavit is based. The Soldiers' and Sailors' Civil Relief Act requires facts be stated showing defendant is not in military service. Stating conclusion only is not sufficient. If defendant is in military service give date of induction, unit and length of service, if known.

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